IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 392 OF 1997
IN
NDPS SPECIAL CASE NO. 163 OF 1992

Shri.D.Bhambri,]
Intelligence Officer, Narcotic]
Control Bureau, Mumbai]
(through Public Prosecutor for]
Union of India)]..Appellant

Vs.

1. Cyprian Chim Ihediwa]
Nigerian National]
2, Ajegewle Street,]
Lagos.]
]
2. The State of Maharashtra]..Respondents

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Shri.J.C.Satpute for appellant
Shri.Atul S.Sarpande Advocate for
Respondent no.1
Ms.Usha V.Kejeriwal A.P.P. for State.

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CORAM : H.L.GOKHALE AND
SMT.V.K.TAHILRAMANI,JJ.
DATE : JULY 27,2004

ORAL JUDGMENT: (PER SMT.V.K.TAHILRAMANI,J.)

1. Through this appeal the appellant i.e. original complainant Shri.D.Bhambri, Intelligence Officer, Narcotic Control Bureau, challenges the judgment and order dated 27th November, 1996 passed by the Special

Judge under the Narcotic Drugs and Psychotropic Substances, Act, Greater Bombay in NDPS Special Case No. 163 of 1992. By the said judgment and order, the respondent no.1 came to be acquitted of the charges under Sections 21, 28 read with Section 23 of the Narcotic Drugs and Psychotropic Substances, Act, 1985 (hereinafter referred to as "NDPS Act"), and Section 135(1)(a) read with Section 135(1)(ii) of the Customs Act, 1962.

2. The prosecution case briefly stated is as under:

. P.W.1 Sunil Chandra Rohatgi, Assistant Director of N.C.B. on 16th February, 1992 received a specific intelligence that three Nigerians viz. Kins Omargbar, Godwin Ogbe and Cyprian Ihediwa (respondent no.1) were leaving Bombay by Zambian Air Ways flight No.QZ 081 ETD for Lagos and they were likely to carry a substantial quantity of heroin concealed in their bodies. Pursuant to this intelligence in the early hours of 17.2.1992, two persons working in the Airways office at Sahar Airport were called to act as panchas during the course of interception and search of the suspects at the Sahar International Airport. When the three suspects including the present respondent no.1, were in the process of boarding the said flight, the N.C.B. officers intercepted them at

about 3.30 a.m. on 17.2.1992. The N.C.B. Officers disclosed their identity to the said persons. The baggage of the three suspects were then examined and searched in the presence of panchas. However, nothing incriminating was found in the said baggages.

3. Thereafter, personal search of the three persons was undertaken. During the said search, P.W.4 G.Rangrajan, Intelligence Officer who was a member of the raiding party of N.C.B. Officials, felt the abdomen of the respondent no.1 and he got a hard feeling in some portion of the abdomen. He therefore, told the repsondent no.1 that his x-ray examination was necessary. He also informed the respondent no.1 that whether before being so examined, the respondent no.1 wants to be produced before any Magistrate. The respondent no.1 declined the said offer. All the three accused were then asked by N.C.B. officials whether they had swallowed or stuffed any psychotropic drug in their bodies. All the three accused answered in the affirmative. In the morning of 17.2.1992 all the three suspects were then taken to St. George Hospital for medical examination. All the three accused were medically examined and x-rayed. The x-ray examination revealed the presence of foreign bodies in the rectum and abdominal flank areas of the said three suspects.

All the three suspects were then brought to the N.C.B. office for purging out the suspect foreign bodies in the normal course. Panchas including P.W.8 Ram Kishor Tiwari, were called to witness the purging operation at the N.C.B. office. During the period between 17.2.1992 and 21.2.1992 all the three accused purged out various quantities of capsules. The said capsules contained heroin. The respondent no.1 purged out 52 capsules, total quantity of which was 600 gms. of heroin. The other two accused i.e. accused Godwin purged out 82 capsules total quantity of which was 950 gms. of heroin and accused Kins purged out 68 capsules total quantity of which was 850 gms. of heroin. The capsules purged out by each of the accused were collected and thereafter, they were opened and samples were taken. All the accused were put under arrest. The samples were sent for chemical analysis. As per the C.A. report Exhibit 12, 'DiacetylMorphine---Heroin' was detected in the said samples which falls in the category under Section 2(xvi)(e) of the NDPS Act. Thereafter, a formal complaint came to be lodged against all the three accused.

4. All the three accused came to be tried separately. The respondent no.1 came to be charged under Section 21 read with Section 8(c) and under

Section 28 read with Section 23 of the NDPS Act and under Sections 135(i)(a) read with Section 135(1)(ii) of the Customs Act, 1962. The respondent no.1 pleaded not guilty and claimed to be tried.

5. During the course of trial, the prosecution has examined eight witnesses. P.W.1 Sunil Rohtagi, P.W.2 Dipak Bhambri, P.W.3 V.N.Doshi and P.W.4 G.Rangrajan are the NCB officers. P.W.5 Dr.Prakash Nalte examined the accused person and Dr. P.W.7 Khulchand H. Kaurani was the Radiologist who took out the X-ray of the respondent no.1. P.W.6 Balkrishna Kedara was the panch at the air port and P.W.8 Ram Kishor Tiwari had acted as a panch in the N.C.B. office where the capsules were purged out. After going through all the evidence, the learned Special Judge acquitted the respondent no.1 of all the charges. Hence, this appeal.

6. We have heard Mr.Satpute, the learned counsel appearing for the appellant and Mr.Atul Sarpande the learned counsel for the respondent no.1-accused and Smt.U.V.Kejeriwal, the learned A.P.P. for the State. We have also perused the entire material on record. After utmost circumspection, we have reached the conclusion that this appeal deserves to be dismissed. We are amply satisfied that the view of the acquittal

was not only a possible view but a plausible one.

7. The respondent no.1 has been acquitted mainly on two grounds i.e. there is no compliance of Section 50 of the NDPS Act and that there is a serious doubt as to the identity of the capsules actually purged out by respondent no.1.

8. As far as compliance of provisions under Section 50 of the NDPS Act is concerned, the learned Special Judge came to the conclusion that Section 50 of the NDPS Act was not complied with. The evidence on record did not show that the accused was apprised of his right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. From the evidence of P.W.4 G.Rangrajan, it is seen that he told accused that his x-ray examination was necessary. Therefore, he asked the accused whether before being examined with the help of x-ray, he desired to be produced before any Magistrate. It is the case of the respondent no.1 that both the options contemplated under Section 50 of NDPS Act were not given to him and hence, there was no proper compliance of Section 50 of the NDPS Act. In reply, Mr.Satpute contended that in the present case, provisions of Section 50 of the NDPS Act, would not be attracted as the contraband was not found on the

person of the accused but it was found inside the body. Mr.Atul Sarpande submitted that even if the contraband is inside the body of the person, Section 50 of the NDPS Act would still be attracted. He has placed reliance on the decision of this Court in the case of **Ahmed Adenwala Kola Vs. V.M.Dosi and ors. reported in 2001 ALL MR (Cri.) 857** and on an unreported decision dated 9th July, 2003 of the Division Bench of this Court in **Criminal Appeal No. 34 of 1999 in the case of Shaikh Salauddin Ibrahim and another Vs. State of Maharashtra** (Coram : S.S.Parkar and V.K.Tahilramani,JJ.). However, assuming that Section 50 of the NDPS Act is attracted to the facts of the present case, we find that there is sufficient compliance of Section 50 of the NDPS Act. As stated above, P.W.4 G.Rangrajan has specifically stated that respondent no.1-accused was specifically asked whether he wanted to be searched in the presence of a Magistrate and respondent no.1-accused declined the offer. In the decision of the Supreme Court in the case of **T.T.Haneefa Vs. State of Kerala reported in 2004(4) Supreme 238**, it is observed as under:

. "5. The counsel for the appellant submits that under Section 50 of NDPS Act, accused should have been told

that he has got a right to be searched in the presence of gazetted officer or a Magistrate and this option was not given to the appellant and it was argued that in the instant case, the appellant was asked only whether he would like the presence of a Magistrate and in that way there was violation of Section 50 of NDPS Act. We are unable to agree with the plea raised by the appellant Ex.P1 Mahazar shows that before the search the appellant was asked whether he would like the presence of a magistrate, he declined to avail that privilege and thereafter the search was conducted and drug was recovered from his possession.

. 6. The plain reading of Section 50 of NDPS Act does not show that the accused has got a right of option either a gazetted officer or the Magistrate, rather the option is for the officer who conducts the search.....

. 7. If the accused says that search shall be in the presence of gazetted officer or Magistrate, the officer can choose any one of them depending upon the availability of gazetted officer or the Magistrate. In this case, the appellant was given an option to be searched in the presence of Magistrate, he did not exercise that right. The counsel for the appellant drew our attention to the decision of this Court in Beckodan Abdul Rahiman Vs. State of Kerala, 2002(4) SCC 229, wherein this Court held that there was violation of Article 50 of NDPS Act. It is pertinent to note that the nature of option given to the accused by the searching officer and the facts show that in that case the inquiry was made by the searching officer as to whether the accused would like to meet any higher officer or a Gazetted officer and the accused replied in negative. These words used by the searching officer were certainly not in compliance of Section 50 of the

> NDPS Act. It was in that background this Court set aside the conviction on the ground that there was violation of Section 50 of NDPS Act. In the instant case, we do not think there is any violation of Section 50 of the NDPS Act, as the accused was given the right to be searched in the presence of a Magistrate as he failed to opt for that we do not think that there was any procedural illegality."

9. In view of the above decision of the Supreme Court in the case of **T.T.Haneefa (Supra)**, we find that in the present case there is sufficient compliance of Section 50 of the NDPS Act.

10. However, as stated above, the respondent no.1 has also been acquitted on the ground that there is serious doubt as to the identity of the capsules actually purged out by the respondent no.1.

11. Mr.Atul Sarpande, the learned advocate appearing for respondent no.1 has placed reliance on the decision of the Supreme Court in the case of **Narcotics Control Bureau Mumbai Vs. Abdulla Hussain Juma and others reported in 2003 Cri.L.J. 3850**, and

contended that the accused came to be acquitted in the said case and the acquittal came to be confirmed by the appellate Court as there was serious doubt as to the identity of the sachets actually purged out by the accused. He has urged that the facts therein and the facts in the present case are similar and hence, acquittal of the respondent-accused deserves to be confirmed. We have perused the said judgment and we find that the facts therein and the facts in the present case are quite similar. In the said case also, the relevant persons were not personally present when the sachets were recovered after they were purged out by the concerned accused nor they were present when the sachets, after collection, were collected and handed over. Hence, it was held that there was serious doubt as to the identity of the sachets actually purged out by the respondent no.1. In the present case also, the relevant witnesses have not deposed on this material aspect. On examining the evidence, we find that it cannot be conclusively established that capsules in which the heroin was found, were infact purged out by the respondent no.1. P.W.8 Ram Kishor is the panch in relation to the purging out the capsules by all the three accused. He has stated that on 17.2.1992 at 5.30 p.m. accused Kins purged out 12 capsules. Those capsules were collected in container containing dettol. Out of 12

capsules, he himself took one capsule and when the said capsule was opened, it was found containing brownish colour powder. The powder came to be tested and the test answered positive for the presence of heroin. Thereafter, this witness has stated that accused Godwin and third accused Kins also purged out some capsules. Thereafter, this witness has stated that he left the N.C.B. office. When he came back, the N.C.B.officers informed him about the details of purging out capsules by the all the accused. This purging has admittedly happened in the absence of panchas. Thereafter, on 28.2.1992 this witness has again visited N.C.B. office and claimed to have witnessed counting of the capsules and drawing of the samples therefrom. However, nowhere does the panch or the panchnama state that the capsules purged out by the respondent no.1, were tested and they were found positive for heroin. It is pertinent to note that the panch witness does not give the exact time when the respondent no.1 first purged out the capsules. He does not give the number of the capsules. From the evidence, it is clear that panchas have no personal knowledge of the actual purging out of the capsules produced by the present respondent no.1. Moreover, there is nothing special about the said capsules by which its source could be made out and any of the three accused connected

therewith. There is no record forthcoming relating to the safe custody of the purged out material at N.C.B. office during the period between 17.2.1992 and 21.2.1992. Moreover, articles 1 to 3 which are the envelops which contained the samples also do not bear any date on which the panchas put their signatures.

12. Mr.Satpute, the learned counsel for the appellant has placed reliance on the confessional statement made by the respondent-accused under Section 67 of the NDPS Act at Exhibits-30 and 31. We have perused the said statements. However, on going through the same, we have grave doubt as to whether it was actually the respondent no.1-accused who made those statements. The respondent no.1 is Cyprian Ihediwa however, in the statement allegedly made by him, he has stated that:

. "thereafter the officers searched my baggages consisting of two hand baggages and one checked in baggage and my person in the presence of two witnesses. Nothing incriminating was found in the search. The officers simultaneously searched two more passengers named

Mr.Cyprian Chim Ihediwa and Mr.Godwin O.Ogbu".

13. If the statement was really that of respondent no.1 Cyprian, we fail to understand how he could have stated that the officers simultaneously searched two more passengers named Mr.Cyprian and Mr.Godwin. This clearly shows that the statement was not made by the respondent no.1 Cyprian. The statements allegedly made by the respondent no.1-accused, do not inspire confidence, hence, we are not inclined to rely on the same. On reading these statements, it does not appear that said statements have been voluntarily made by the respondent no.1. Thus, we are not inclined to accept the same.

14. In the present case, it is pertinent to note that it is the prosecution case that there were 85 capsules in the body of respondent no.1. However, as per the evidence, the respondent no.1 purged out only 52 capsules, which means, 33 capsules remained in the body of the respondent no.1. There is no evidence on record to show that as to what happened to the balance 33 capsules. Moreover, after the accused came to be apprehended at the airport, he was referred for medical examination and x-ray. P.W.7

Kaurani was the Radiologist in the St.George Hospital. All the three accused persons were referred to him for x-ray. Dr.Kaurani stated that x-ray examination of the respondent no.1 shows that there were 14 oval shaped densities in the rectum and abdominal flank area of the respondent no.1. This number is totally inconsistent with the number of the capsules allegedly purged out by the respondent no.1. One is at loss to understand as to how when only 14 densities are found in the x-ray, the respondent no.1 is said to have purged out 52 capsules and further 33 capsules remained in the body of the respondent no.1. This discrepancy raises doubt in the mind about the veracity of the prosecution case. As observed earlier, panch witness P.W.8 Ram Kishor Tiwari was not personally present when the capsules were purged out by the respondent no.1, nor does he specifically state that the capsules after they were collected and cleaned, were handed over in his presence. Moreover, the capsules purged out by the respondent no.1, were not tested by the N.C.B. Officers in the presence of the panchas, as was done in the case of other accused. Three accused persons came to be apprehended together as per the prosecution case, all of them have purged out a number of capsules. From the evidence on record, it appears that only the capsules purged out by the other accused were tested

on the field test kit in the office of the N.C.B.

and not those purged out by the respondent no.1.

15. In view of all the above facts, we agree with the findings of the learned Special Judge that the prosecution has not established beyond reasonable doubt that the capsules which were collected on various dates between 17th and 21st February, 1992, were as a matter of fact, purged out by respondent no.1 and not by any of the other two accused persons. In such factual background, we feel that the learned Special Judge was justified in coming to the conclusion that the prosecution has failed to establish the recovery of the heroin weighing 600 gms. from the respondent no.1 beyond all reasonable doubt. In our opinion, this ground alone is sufficient to sustain the judgment of the Special Judge. Apart from this, we cannot loose sight of the fact that this is the case wherein the acquittal of the respondent no.1 has been challenged. It is well settled that if the view of acquittal could have been reasonably arrived at, then the mere circumstance that the appellate Court would have taken a different view would be no ground to interfere. In this connection, there are no dearth of authorities but to eschew prolixity, we are referring to only a few of them viz.; **A.I.R. 1971 S.C. 66 Khedu Mohton and**

others Vs. State of Bihar and A.I.R. 1987 S.C. 1083 Tota Singh Vs.State of Punjab. We also feel that in this connection, it would be pertinent to refer to the decision of the Apex Court reported in **1995(2) SCC 486, State of Punjab Vs. Ajaib Singh**, where in para 7, Their Lordships of the Apex Court observed thus:-

. "We agree that this Court is not precluded or the Court hearing the appeal against acquittal is not prevented from examining and reappreciating the evidence on record. But the duty of a Court hearing the appeal against acquittal in the first instance, is to satisfy itself if the view taken by acquitting Court exercising appellate jurisdiction was possible view or not. And if the Court comes to conclusion that it was not, it can on reappreciation of evidence reverse the order".

16. In our view, in the facts of the present case the view of acquittal was a possible and a reasonable one. In the circumstances, we find no

merit in this appeal and the same deserves to be dismissed.

17. We may state here that during the pendency of the appeal, respondent was granted bail in the present case, however, he could not avail of the bail as he was also convicted in NDPS Special Case No. 551 of 1997 by the learned Special Judge, Gr.Bombay and he is in custody in that case.

18. In the result, we pass the following order:

. The appeal is dismissed. The judgment and order of acquittal dated 21st/27th November, 1996 recorded by Special Judge, Greater Bombay, in NDPS Spl.Case No. 163 of 1992, is confirmed. Though the respondent no.1-accused was granted bail in the present case, he could not avail of the bail as he is in custody in NDPS Special Case No.551 of 1997 in which he was convicted and hence, he is in jail. The bail bonds of the respondent no.1 in the present case stand cancelled. The respondent no.1-accused be set at liberty if he is not required in NDPS Special Case No.551 of 1997 or any other case.

[H.L.GOKHALE,J.]

[V.K.TAHILRAMANI,J.]

FARAD CONTINUATION SHEET
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

CRIMINAL APPEAL NO. 392 OF 1997

Office Notes, office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders
	Shri.J.C.Satpute for appellant Shri.Atul S.Sarpande Advocate for Respondent no.1 Ms.Usha V.Kejeriwal A.P.P. for State. **CORAM: H.L.GOKHALE AND SMT.V.K.TAHILRAMANI,JJ.** **DATE : 27 JULY,2004** . For the reasons separately recorded in the judgment, the following operative order is passed: . The appeal is dismissed. The judgment and order of acquittal dated 21st/27th November, 1996 recorded by Special Judge, Greater Bombay, in NDPS Spl.Case No. 163 of 1992, is confirmed. Though the respondent no.1-accused was granted

bail in the present case, he could not avail of the bail as he is in custody in NDPS Special Case No.551 of 1997 in which he was convicted and hence, he is in jail. The bail bonds of the respondent no.1 in the present case stand cancelled. The respondent no.1-accused be set at liberty if he is not required in NDPS Special Case No.551 of 1997 or any other case.

[H.L.GOKHALE,J.]

[SMT.V.K.TAHILRAMANI,J.]